Central Law Journal

St. Louis, August 20, 1926

FOREIGN CORPORATION CONSIGNING GOODS TO LOCAL FOREIGN MERCHANTS AS DOING BUSINESS IN THE LOCAL STATE—PART II.

It does not constitute doing business within the state, for a corporation to contract for the sale of an article of its manufacture through an agent of the state, where the order is subject to acceptance at the home office, from which the article is to be shipped, although the selling agent, in making the contract, acts under a general agreement with the corporation by which his place of business is constituted the general office of the corporation, and is maintained in its name, and all records of the office belong to it, the expenses, rent, clerk hire, etc., however, being paid by the agent. American Case & Register Co. v. Griswold, 68 Misc. 379, 125 N. Y. Supp. 4, 44 L. R. A. (N. S.).

Nor is a foreign corporation doing business in the state by selling its product in the state by a factor in his own name, who is to make the sale and receive the consideration in his own name, and to guarantee the collection of any credit extended to purchasers. Brookford Mills v. Baldwin, 154 App. Div. 553, 139 N. Y. Supp. 195.

In People ex rel. Southern Cotton Oil Co. v. Roberts, 25 App. Div. 13, 48 N. Y. Supp. 1028, it was held that the fact that a foreign corporation consigned a portion of its goods to a commission merchant for sale, and that sales were made in the state from such goods, either directly at a price as directed by the corporation, or in fulfillment of orders approved by the corporation, the proceeds being deposited in a bank to the credit of the corporation, did not authorize the conclusion that the corporation was doing business within the state, within the meaning of the franchise tax law.

In Bertha Zinc & Mineral Co. v. Clute, 7 Misc. 123, 27 N. Y. Supp. 342, it was held that sales made by a factor to whom goods had been consigned by a foreign corporation did not constitute the doing of business within the state by the foreign corporation, as the factor, and not the consignor, does the business of selling and collecting under such circumstances.

In the case of Cooper Rubber Co. v. Johnson, 133 Tenn. 562, 182 S. W. 593, it was held that a foreign corporation which consigned tires for sale to a company handling automobile accessories in the state, was not "doing business" within the state to render necessary compliance with the foreign corporation act, since the business of the factor or commission merchant, synonymous terms, meaning one whose business is to receive and sell goods for commission, is not the conduct of an agency or business for the consignor of the goods sold where the factor picks customers at his own risk and the consignor does not exclusively own the proceeds. It is further held that the requirement of a contract between the Rubber Company and the local company selling tires that the local company should keep the goods insured in the name of the Rubber Company, did not constitute the local company a business agency of the Rubber Company so to render the latter subject to laws relating to doing business in the state. It was further held that a provision in the contract that the local company should make adjustments necessary under the selling guaranty out of the foreign Rubber Company's stock in the local company's hands did not render the foreign company subject to the laws relating to engaging in business within the state.

In Cole Motor Car Company v. Hurst, 228 Fed. 280, decided by the Circuit Court of Appeals for the Fifth Circuit, contracts between a manufacturer of motor cars and a dealer, designated as a distributor, provided that cars would be invoiced to the distributor at the regular catalog price, subject to certain discounts, considered his

profits; that he should have the exclusive right to sell the manufacturer's cars in certain designated territory within the state of Texas, and not elsewhere; that remittances for all cars shipped to him would be made the same day cars were sold; that when cars were shipped direct to his agents, sight drafts would be drawn and a check mailed by the manufacturer on Monday of each week, covering commissions due on shipments for which payment had been received during the previous week; that the distributor would keep the cars insured in the manufacturer's name until sold and paid for; that if the contract was canceled the manufacturer would take over any new cars then on the distributor's show floor at the invoice price with carload freight added; and that if the distributor canceled the contract he would take and pay for all cars on hand or in transit. The contract was made in Indiana, and the cars were to be shipped from Indiana, f. o. b., to the distributor in Texas. It was held that the transaction was a consignment and not a sale, and the contract was an interstate one, the validity of which was governed by the Federal anti-trust laws and not by the anti-trust laws of Texas.

In Butler Brothers Shoe Company v. United States Rubber Company, 156 Fed. 1, decided by the Circuit Court of Appeals for the Eighth Circuit, it is held that a foreign corporation, which has no warehouse, office or place of business, and which neither incurs nor pays any of the expenses of receiving, handling, storing or selling its goods in a state to which it consigns them to its factor, who conducts all the business there, assumes and pays all the expenses of receiving, selling, handling and storing the goods, is not doing business in the latter state within the true meaning of the statute relative to the admission of foreign corporations.

In Atlas Engine Works v. Parkinson, 161 Fed. 223, it was held that a contract whereby one party was constituted the agent of a foreign corporation to sell its engines and boilers on commission in a certain territory, agreeing to receive and hold strictly on consignment all machinery shipped to him, to make monthly reports of all merchandise on hand unsold, pay freights, store and keep in good order without charge, pay taxes, keep the goods insured, hold unsold machinery subject to the orders of the corporation, ship it as directed, and pay charges, the corporation to refund freights, also to guarantee payment for machinery sold, at the expiration of two years from the date of shipment unsold goods to be bought and paid for in cash at the corporation's option, or loaded on cars as the corporation might direct, the agent to pay freights, and the agent to have the benefit of all sales made in the territory fixed by the contract, was a bailment for sale by a factor under a del credere commission, and related to interstate commerce.

Nor does shipping goods within a state to be sold at wholesale throughout the state by a consignee, the consignee to pay for the goods at agreed prices. Wagner v. J. & G. Meakin, 33 C. C. A. 577, 63 U. S. App. 476, 92 Fed. 76.

In the case of American Steel & Wire Co. v. Speed, 192 U. S. 500, 24 Sup. Ct. 365, it is held that a state is not precluded by the commerce clause of the Federal Constitution from imposing a merchants' tax upon a non-resident manufacturing corporation which has selected a city of that state as a distributing point, and has secured a local transfer company to take charge of its products when shipped to that point, assort them, store them in a warehouse and make delivery in the original packages to the customers of the manufacturer, either as expressly directed by it, or under general directions in favor of its recognized and approved customers, whose names were furnished to the transfer company, since under such circumstances the goods, when stored in the warehouse were no longer in transit, but had reached their destination and were held in the state for sale.

NOTES OF IMPORTANT DECISIONS

CALIFORNIA TRUCK TRANSPORTATION ACT INVALID AS TO PRIVATE CARRIERS.—The United States Supreme Court, in Frost v. Railroad Commission, 46 Sup. Ct. 605, holds that the California Truck Transportation Act (St. 1917, p. 330, as amended by St. 1919, p. 457), construed as requiring private carriers to assume duties and burdens imposed on common carriers as condition of use of highways was in violation of due process clause of Const. U. S. Amend. 14.

Concluding its opinion, the Court said:

"We hold that the act under review, as applied by the court below, violates the rights of plaintiffs in error as guaranteed by the due process clause of the Fourteenth Amendment, and that the privilege of using the public highways of California in the performance of their contract is not and cannot be affected by the unconstitutional condition imposed. Western Union Tel. Co. v. Kansas, (30 S. Ct. 190).

"The court below seemed to think that, if the state may not subject the plaintiffs in error to the provisions of the act in respect of common carriers, it will be within the power of any carrier, by the simple device of making private contracts to an unlimited number to secure all the privileges afforded common carriers without assuming any of their duties or obligations. It is enough to say that no such case is presented here, and we are not to be understood as challenging the power of the state, or of the Railroad Commission under the present statute, whenever it shall appear that a carrier, posing as a private carrier, is in substance and reality a common carrier, to so declare and regulate his or its operations accordingly."

Old Skinflint: "Here, boy, what's this you were shouting?"

"Great Swindle—60 victims!"

"I can see nothing about it in this paper." Newsboy: "Great Swindle—61 victims!"

Golfer (to new member): "They say this club is haunted—a phantom golfer goes round the course every night."

New Member: "In how many?"

Mr. Thickhead: "When I read about some of these wonderful inventions in electricity it makes me think a bit."

Miss Smart: "Yes, is'nt it remarkable what electricity can do?"—Dalton Breeze.

SUBROGATION
Part I

Kinds of Subrogation—Subrogation is a fiction of equity, which puts one in the place of another. For this, there may be various reasons. There are as many kinds as there are reasons. A subrogation claimed may not be within the reason of prior decisions. It does not follow that there is no right to the subrogation. There may be another reason. To give due effect to the decisions, they must be classified in accord with the real reason for the subrogation. A proposition true as to one class may be false as to another.

The most common subrogation is that of the surety. This has been extended to one who is morally bound to pay a debt,[1] to anyone who has as, or thinks he has,[2] an interest to be protected by its payment, and to one who, by his own default, is liable for a debt which another ought to pay.[3] Courts have tried to bring all subrogations within the formulas of the subrogation of the surety, and there has been a tendency to deny the subrogation where there has been no forced payment of a debt which another ought to pay. For this there are strong authorities. Some have been overruled; others will be. "A broader doctrine is now generally recognized.[4] The cases first appear as ill-defined exceptions to the rule against volunteers. Each advance has been strongly contested. Courts have denied subrogation and, in later cases, have given full effect to the equity under another name.[5]

(1) Voltz v. Baker, 158 Ill. 532, 42 N. E. 69, 30 L. R. A. 155.

(2) 6 Pom. Eq. sec. 921, 921a; Harrison v. Harrison, 149 Tenn. 601, 259 S. W. 907, 32 A. L. R. 563.

(3) Stewart v. Com. (Ky.), 272 S. W. 906; Usher v. Tucker Co., 217 Mass. 441, 105 N. E. 360, L. R. A. 1916, 826.

(4) 5 L. R. A. N. S. 838, note to Capen v. Garrison; 46 L. R. A. N. S. 1049, note to So. C. O. Co. v. Napoleon H. C. Co.; Berry v. Stigall, 253 Mo. 690, 162 S. W. 126, 50 L. R. A. N. S. 489.

(5) Milam v. Milam, 138 Tenn. 686, 200 S. W. 826. Compare Aetna L. Ins. Co. v. Middleport, 124 U. S. 534 (31 L. Ed. 537), with Board of Com'rs v. Irvine, 61 C. C. A. 607, 126 Fed. 689, 192 U. S. 607 (48 L. Ed. 585) and Ill. G. T. Ry. Co. v. Wade, 140 U. S. 65 (35 L. Ed. 342). In the Middleport case, the railway had a right to the donation on return of the void bonds. This right was inseparable from the bonds and passed to the purchaser. Board of Com'rs v. Irvine accords better with prior cases; Parkersberg v. Brown, 106 U. S. 487

"This doctrine, long ago adopted by Courts of Equity, but apparently allowed to fall into oblivion, has recently been revived in the Nottingham Building Society case. It is a part of the general principle of subrogation, by which a fund which has benefited by an operation, or a series of operations, is charged with liabilities properly incurred in conducting such operations."[6]

Law is made by fights for justice. Just causes are often lost and the growth of the law is stayed. It was once said that hard cases make bad law. Hard cases have made most of the good law we have. Bad law made by hard cases in one generation, is apt to be the good law of the next.[7] A purchaser at a void execution sale cannot recover his money, but he may follow it into the judgment it has paid. Of this rule, Mr. Freeman wrote in 1876: "We know not whether the rule . . . ought to be admired for its unquestionable justice, or condemned for its equally unquestionable conflict with legal principles."[8] This is omitted in later editions. The next edition will probably approve the rule.[9]

A part owner may grant or mortgage land to pay liens, thinking that he owns, or has power to convey, the fee. His interest gives him the subrogation of a surety, and this right to subrogation passes by his deed or mortgage.[10]

Though a purchaser thinks that he is getting the fee, he may get only a limited interest. This interest gives him the surety's subrogation. If he gets no interest but assumes adverse possession, he has title against all except the owner. If he pays a charge to protect this title, he should have the surety's subrogation. This may not be "what the law has been" but it seems to be "what it tends to become." To a purchaser, who pays to protect a title which he thinks he has, the surety's subrogation cannot be justly denied.[11]

Subrogations of the Creditor—Of the subrogations of the creditor to securities held by the surety, there seems to be three classes: (1) Subrogation to securities for payment to the creditor. (2) Subrogation in the nature of a creditor's bill to reach an asset of the principal. (3) Subrogation in the nature of a creditor's bill against an asset of the surety.

If the security is a charge on the principal's property for payment to the creditor, the subrogation is within the reason of each of these classes. If the security is a charge on the principal's property to indemnify the surety against loss, the subrogation is within the second and third classes. If the security is the personal liability of a third person or a charge on his property to indemnify the surety against loss, it is an asset of the surety, which may be reached by a subrogation in the nature of a creditor's bill against an asset of the surety.

If the security is for payment to the creditor, we have a promise to one of performance to another. Equity "will annex to such a contract an obligation directly to B; and, hence, the latter can obtain in equity, the benefit intended to be secured to him by the contract."[12] In a bond to A conditioned to pay B, "A is evidently a trustee."[13]

If the security is a charge on the principal's property, subrogation subjects his

(27 L. Ed. 238); Chapman v. Douglas Co., 107 U. S. 348 (27 L. Ed. 378); Citizens' S. & L. Ass'n v. Belleville & S. I. R. Co. 117 Fed. 109, 54 C. C. A. 495, 187 U. S. 645 (47 L. Ed. 347).

(6) Jenks, Dig. Eng. Civ. L. 23 sec. 55, citing Earl v. Peale (1712) 1 Salk. 387, Marlow v. Pitfield (1719), 1 P. W. 558, Thurston v. Nottingham Bld. Soc. (1902), 1 Ch. 1, Exp. Margrett (1891) 1 Q. B. 413.

(7) Milam v. Milam, 138 Tenn. 686, 200 S. W. 826.

(8) Freeman, Executions (1st Ed.) sec. 352.

(9) 69 L. R. A. 39 note to Cooper v. Weaver; Cf. 36 L. R. A. N. S. 1218, note to Dresser v. Kronberg.

(10) Haverford L. & B. Ass'n v. Fire Ass'n, 189 Pa. 522, 37 Atl. 179, 57 Am. St. 657; Hughes v. Thomas, 131 Wis. 315, 11 L. R. A. N. S. 744, 111 N. W. 474, 11 Ann. Cas. 673; Connor v. Home etc. Ass'n 20 Ky. L. R. 109, 80 S. W. 797; contra, Capen v. Garrison, 193 Mo. 335, 92 S. W. 368; 5 L. R. A. N. S. 438, overruled in Berry v. Stigall, 253 Mo. 690, 162 S. W. 126, 50 L. R. A. N. S. 489; Meeker v. Larson, 65 Neb. 158, 90 N. W. 958, 57 L. R. A. 901; but see Bowink v. Christiaance, 65 Neb. 262, 95 N. W. 652.

(11) New v. Smith, 94 Kan. 6, 145 Pac. 880, L. R. A. 1915 F. 771; 25 R. C. L. 1356, sec. 39; Hofman v. Demple, 52 Kan. 756, 35 Pac. 803; Spalding v. Harvey, 129 Ind. 106, 26 N. E. 323, 13 L. R. A. 619.

(12) (Langdell, Eq. J. 17).

(13) (1 Chitty Pl. 3).

property to the payment of his debt. The surety need not be liable. A mortgage to a supposed surety with power of sale to pay the debt, makes him a trustee for the creditor.[14]

Though the security is not for payment to the creditor and is not a charge on his property, it is an asset of the surety. The creditor is the only one who can reach this asset.

A too obvious distinction has led some courts to deny the subrogation in the nature of a creditor's bill against an asset of the surety.[15] Since the cases cited, the power of a court of equity to subject choses in action to the payment of a judgment, has been made clearer,[16] and the doctrine of subrogation has been extended.[17] A right to indemnity against loss is an asset. This asset should be subjected to the creditor's claim, though the surety has no other assets. On a debt created by an executor, "the creditor has no legal right against the estate, but he is allowed in equity to enforce on his own behalf the executor's right to indemnity. He is subrogated to this right, while he retains also his legal claim against the executor."[18]

If the security is for the payment of the debt or for indemnity against liability, it gives the creditor a right which the surety cannot release; but, if the security is for indemnity against loss, the surety may release it if he remains solvent and acts in good faith.[19]

Conventional Subrogation—Subrogation is a specific performance of a promise that one who pays a charge shall have it. The law has no adequate remedy for the breach of a promise to give security.[20] The priority of the lien is saved. Intervening rights are as they were. One should have what he pays for, if it can be given without hurt to others. "It is but just that the debtors themselves should have power to put in place of the creditors those who pay for them, since nobody receives any prejudice thereby, and since it is to the interest of the debtor that he should have the power of making his condition easier by changing his creditor."[21]

When subrogation is needed to make a transaction operate as intended, assent to the transaction is an assent to the subrogation.[22] Construction notice of intervening rights will not bar it,[23] nor will actual knowledge. The debtor may pass the charge with its priority to one who pays it.[24] To defeat the subrogation, the holder of an intervening right must show that he has been misled to his prejudice by the apparent satisfaction.

Subrogations Based on the Maxim That Equity Looks to the Substance—A small class rests on the maxim that equity looks to the substance. A husband is held for money lent to his wife for necessaries.[25] An infant is held for money lent for necessaries.[26] Putting the lender in place of the seller—equity finds a debt for necessaries. "The persons who provided the necessaries would have had a remedy against the husband, and he, who has found the money and satisfied their claims, is allowed in

(14) (Morgan v. Cooper, 1 Head (Tenn.) 431; Hoss v. Crouch, (Tenn.) 48 S. W. 724 (3), 728).

(15) Hampton v. Phipps, 108 S. W. 264, 27 L. Ed. 719; Seward v. Huntington, 94 N. Y. 113; Am. Surety Co. v. Boyle, 65 Oh. St. 494, 63 N. E. 75; Black v. Kaiser, 91 Ky. 16 S. W. 89.

(16) 6 Pom. Eq. sec. 877, 878; 63 L. R. A. 673, note to Hall v. Henderson.

(17) 1 Williston, Con. secs. 311, 313, 314, 255 Note 70; Ames, Lectures 459 to 465; Hoffman v. Anderson, 112 Ky. 893, 67 S. W. 49; 40 L. R. A. N. S. 233, note to Swaine v. Hemphill; L. R. A. 1916 C. 1075, note to Johnson v. Martin.

(18) 13 Halsbury, L. Eng. 150; 1 Williston, Con. sec. 255, note 70; Brown & Heywood Co. v. Ligon, 92 Fed. 851, 856; 35 A. L. R. 50, note to Peroz v. Gill.

(19) L. R. A. 1916 C. 1079, note to Johnson v. Martin.

(20) 3 Williston, Con. sec. 1421, note 56; 19 R. C. L. 275, sec. 46.

(21) Fievel v. Zuber, 67 Tex. 275, quoting 2 Strahan's; Domat Civ. L. Cushing's Ed. 698, sec. 1783, note.

(22) So. C. O. Co. v. Napoleon H. C. Co., 108 Ark. 555, 158 S. W. 1082; 46 L. R. A. N. S. 1049; Platte V. C. Co. v. Bosseman, etc. Co., 45 L. R. A. N. S. 1137, 1141; 121 C. C. A. 102, 202 Fed. 692. 37 A. L. R. 386. Citizens M. E. v. Eastin.

(23) Hill v. Ritchie, Vt., 98 Atl. 497, L. R. A. 1917 A 731.

(24) San Antonio C. L. Co. v. Blalock (Tex. Civ.), 256 S. W. 974, (Tex. Com.) 267 S. W. 474; 37 L. R. A. N. S. 1208, 1210, note to Bell v. Bell.

(25) 1 Williston Con., sec. 270, note 93, 13 R. C. L. 1209.

(26) 1 Williston Con., sec. 243, 14 R. C. L. 25, note 10. Jenks, Dig. Eng. Civ. L. 23 sec. 55.

equity to stand in their place."[27] A homestead is charged for money lent to buy it[28] or to pay for it.[29] There may be no grantor's lien, but the debt is in substance a debt for purchase money. Money lent to pay current expenses of operation is a debt "for current expenses of such operation" within a statute that a company organized to take over a railroad sold on foreclosure, shall take subject to such debts.[30] Here, as in the homestead cases, the court applies the equitable maxim in construing the statute. One, who pays burial expenses at the request of the widow, is subrogated to the claim against the estate.[31] This class is small. There is no mechanic's lien for money lent to a contractor to pay for labor and material. The owner could not keep tab on the contractor, nor the contractor on a subcontractor. Money lent to pay for labor and material is not within a contractor's bond to pay for labor and material. The loan covers up a default and the surety would be misled.[32] In bankruptcy, a loan to pay wages has no priority.[33] It misleads creditors.

For money lent to buy land, there is no grantor's lien, nor a resulting trust. These rules are inconsistent with the rule as to money lent for necessaries. The rule as to necessaries has shown more vitality, and does more perfect justice.[34]

ROBERT T. HOLLOWAY.

Dallas, Texas.

(*Note.* Part II will follow in next number.)

(27) 13 Halsbury, L. Eng. 149, sec. 176.

(28) Acruman v. Barnes, 66 Ark. 442, 51 S. W. 319, 74 Am. St. 104; Zehr v. May, Okla., 169 Pac. 1077, L. R. A. 1918 C 431.

(29) L. R. A. 1915 E. 875 note, 18 A. L. R. 1103, note; contra, Phillips v. Colvin, 114 Ark. 14, 169 S. W. 316, L. R. A. 1915 E 875. This is one of the courts, which "for reasons difficult to understand, treat the lien as strictly personal to the grantor, and as incapable of being transferred, either by direct assignment or by equitable subrogation" (3 Pom. Eq. sec. 1254).

(30) I. & G. N. Ry. Co. v. Concrete Im. Co. (Tex. Com.) 263 S. W. 265.

(31) Lay v. Lay, 201 Ky. 93, 255 S. W. 1054; Security B. & T. Co. v. Costen (Ark.), 273 S. W. 705.

(32) U. S. Fidelity Nat. Bank v. Rundle, 107 Fed. 227, 52 L. R. A. 505.

(33) 2 Loveland, Bk., 1129 sec. 593.

(34) Milam v. Milam, 138 Tenn. 686, 200 S. W. 826.

DEATH—ACTION BY FOREIGN ADMINISTRATRIX

SHAW v. CHICAGO & A. R. CO.

282 S. W. 416

(Supreme Court of Missouri, March 12, 1926)

Foreign administratrix may bring action in state of Missouri under federal Employers' Liability Act (U. S. Comp. St. §§ 8657-8665) for wrongful death of her intestate in Illinois, in view of Rev. St. 1919, § 1163.

Roger S. Miller and Charles M. Miller, both of Kansas City, for appellant.

J. Vernet Jones, of Slater, and Harry R. Freeman and Madden & Madden, all of Kansas City, for respondent.

GRAVES, J. Action for death of the husband, occasioned by the alleged negligence of the defendant.

It is not seriously contended that deceased, at the time of his accident and death, was not engaged in interstate commerce. The action is brought under the Employers' Liability Act (U. S. Comp. St. §§ 8657-8665). The deceased and his family lived at Roodhouse, Greene county, Ill. Deceased was switchman employed in defendant's yards at Roodhouse. Plaintiff, the wife of the deceased, was appointed administratrix of his estate by the proper court in Greene county, Ill. One line of defendant's road was operated from Roodhouse, in Greene county, Ill., across Missouri, and into Jackson county, Mo., in which latter county this suit was brought. The plaintiff sues as administratrix for and in behalf of herself, and a minor son, who was born a few days after Shaw met his death. The negligence is thus stated in the petition:

"Plaintiff further states that on or about the 24th day of May, 1920, John D. Shaw, deceased, was in the employ and service of defendant as a switchman at said yards in Roodhouse, Greene county, Ill., and was engaged with other employees of defendant in switching cars in and about said yards; that said cars and their contents were shipped and moved from points outside the state of Illinois and were en route to points in the state of Illinois and other states; and that in handling said cars the defendant and John D. Shaw, deceased, were engaged in commerce between states.

"At the above-mentioned time, a switch engine was being backed over one of said switching tracks to connect with and switch interstate cars and shipments as aforesaid, and one

Whitmore, acting as yardmaster and foreman and vice principal over the plaintiff, stepped upon the footboard of said moving engine at a point near where it was the duty of deceased to board said engine, and remained standing in that position, requiring deceased to step upon the track on which said engine was being operated to board same, and when said deceased was in the act of boarding said engine and stepping from the roadbed to the footboard of said engine, said Whitmore suddenly stepped to that part of the footboard where deceased was attempting to get on, striking his body against that of deceased, causing the latter to fall back to the ground and be run over by said switch engine, cutting off both his legs and injuring him internally, and as a direct result of said injuries he died several hours later on said date.

"Said John D. Shaw was a strong and healthy man, 22 years of age, at the time of his death, and left surviving him Effie Shaw, his widow, age 18 years, and a few days after his death a son, John David Shaw, was born. Said Effie Shaw was entirely dependent upon deceased for her support and maintenance, and this action is brought for the benefit of said widow and child, who had a pecuniary interest in the life of deceased and by said death suffered and will suffer in the future the pecuniary loss of the society, consortium, maintenance, support, assistance, and contributions of said John D. Shaw, deceased, and said child will also suffer the pecuniary loss of his father's care, advice, counsel, and training.

"The injuries and death of said John D. Shaw, deceased, were due to and occasioned by the negligence of defendant, in that said Whitmore was negligent, in that after boarding said engine he remained standing at the end of the footboard where it was the duty of deceased to board the engine and required deceased to step upon the tracks to board said engine, and said defendant was further negligent in that said Whitmore suddenly and without warning stepped towards the opposite end of said footboard and against the deceased, and prevented him getting upon said footboard when he was in the act of boarding said engine, causing deceased to fall and to be injured as aforesaid, and was further negligent in that he failed to warn deceased of his intention to change his position on said footboard. Said Whitmore knew, or in the exercise of ordinary care could have known, at the time he stepped and remained upon the end of the footboard, that it was the duty of John D. Shaw to board said engine, and that John D. Shaw was in a position to board same, and thereafter he also knew, or by the exercise of ordinary care could have known, that John D. Shaw was upon the track and in position to step upon the footboard prior to the time said Whitmore changed his position upon said footboard."

The action was for $75,000. Upon a former trial, plaintiff had verdict for $35,000, but this verdict was set aside for reasons not pertinent here.

The defendant first filed a motion to dismiss the proceedings, the particulars of which will be discussed in the opinion. It suffices to say that the motion was overruled, and defendant answered over.

The answer is: (1) Plea of contributory negligence; (2) assumption of risk; and (3) a renewal in the answer of the grounds upon which the motion to dismiss was predicated, and a prayer asking a dismissal of the proceeding, with other legal relief. Reply was general denial.

Upon the second trial, from the judgment therein this appeal was taken, the verdict and judgment was in for plaintiff in the sum of $25,000.

There is no separate assignment of errors in the brief. Assignments of errors and points and authorities are joined in one. As to this it must be said that the points made assign in specific terms alleged trial errors. These assignments will be left to the opinion. What we have stated is a general outline of the case.

I. The motion to dismiss, which was repleaded by way of answer, urges that both plaintiff and defendant are residents of Illinois; that the cause of action arose in Illinois; that to try the cause in Missouri meant the bringing of witnesses from a great distance; that the trial of such causes originating as this is an imposition upon our courts, and imposition upon the taxpayers of Jackson county, the place of trial; that such a trial would require the taking of depositions and the inconvenience and expense of getting witnesses, all to the great prejudice of the defendant. This point is fully covered by our very recent case of Wells v. Davis, 261 S. W. 58, 303 Mo. 388. The discussion there is so full and so recent that we will not rehash the subject, except to emphasize the fact that a cause of action given by the federal government, and made enforceable in the state courts, as are cases under the Employers' Liability Act, such a law is not one of a foreign country, but is one which fairly comes within the terms of section 1163, R. S. 1919, relative to our practice in this

state. It is a part of the law in every state. See, also, State ex rel. v. Hoffman (Mo. Sup) 274 S. W. 362. The motion to dismiss was properly overruled, and that portion of the answer properly ignored by the trial court.

II. The second assignment of negligence goes to the vitals of the case. The plaintiff had evidence tending to prove the issues of alleged negligence pleaded. No demurrer was lodged against this petition. Notwithstanding this situation, the appellant urges as a second assignment of error that—

"No actionable negligence was proven against appellant, and the trial court erred in refusing appellant's peremptory instructions, for the reason that no actionable negligence was proven against appellant."

As stated above, there was evidence tending to prove the negligence charged in the petition, and we find nowhere a challenge to the sufficiency of the petition to state actionable negligence. The sufficiency of the petition to charge actionable negligence is not even attacked in this court. The portions of the petition which are pertinent we have fully set out in our statement.

As in all cases of this kind, the evidence for plaintiff and defendant is conflicting. There is some conflict in this case, but it was for the jury to reconcile such conflict, and determine the facts. This the jury has done. For the determination of this particular point it will only be necessary for us to give the facts shown by plaintiff, and then determine whether or not they show actionable negligence.

The husband (deceased) of plaintiff was a switchman in the switchyards of defendant at Roodhouse, Ill. The switch crew to which John D. Shaw (deceased) belonged, and with which he was working, was composed of Charles R. Smock, as foreman of the crew, E. O. Vineyard, engineer, William Cardwell, fireman of the engine, John D. Shaw, and Frank England. Joe Whitworth was the assistant yardmaster, and gave the orders to Smock for the switching to be done that night. The crew went on duty at midnight, and Shaw was run over and killed 20 minutes later. Whitworth had charge of business in the north yard more particularly. There were three adjoining yards at Roodhouse, all having a general direction of from south to north. The stockyards were to the northwest. A train of dead freight had come in from Missouri (west of Roodhouse), and this switch crew was to take out and add to cars from this train, in making up a new train to go north and east from Roodhouse. They also had to take off the caboose and put it upon the caboose track, and get another caboose for the train that they were making up. This switching crew went to the roundhouse to get a switch engine for their work, and when they got it they started northward toward the north switchyard, where Whitworth's office was located. Whitworth went with them. There were several switches to be opened as they proceeded northward, and Whitworth assisted in this work and in fact opened two switches. This was shown to have been customary in such yards. Whitworth was working his way up toward his office, and working with this particular switch crew, and riding on their engine. The engine was backing up north, and Whitworth was riding upon the back end of the engine, or the end facing the north. As to exactly what happened, the foreman, Smock, had better speak:

"Q. Now, just tell what operations you went through after you started out. What did you do when you got up to the cross-over leading from the main line to long 9 track? A. We stopped at the cross-over switch, and Mr. Whitworth he got off and threw that, and Mr. English got off to turn it back, and we backed up to the other cross-over switch, about 15 feet from there, and stopped and Mr. Whitworth got off and threw it first and Mr. Shaw got off and went around Mr. Whitworth to throw the second switch for long 9. Both switches were long. Then Mr. Whitworth walked back to the engine and got on the step on the east side, and I gave the engineer a back-up signal, and we backed up to where Mr. Shaw stood, and Mr. Whitworth still standing on the east side at the outside of the footboard, and Mr. Shaw seen he wasn't going to get over—

"Mr. Miller (interrupting): I object to that.

"The Court: Objection sustained.

"Mr. Madden: You can't tell what Mr. Shaw saw.

"Mr. Miller: I move to strike it out.

"The Court: Motion sustained.

"Q. Tell what Mr. Whitworth did and what Mr. Shaw did. A. Mr. Whitworth stood on the outside, and Mr. Shaw stepped over on the inside when the engine got about six feet from him, and stepped to get on, and about this time he started to get over, Mr. Whitworth stepped in front of him, and that hit his foot, and his foot slipped and went in under.

"Q. Who went in under? A. Mr. Shaw.

"Q. Under what? A. The tank of the engine."

Where Whitworth placed himself would be the usual place for the switchman to board the footboard of the engine, and ride. The

custom was for the first one on the board to move to the drawbar. These engines are equipped with two footboards, one upon either side of the drawbar of the engine. Deceased was to the east side of the engine when Whitworth took his position. Whitworth got on when the engine was standing, and upon Smock's signal it started up and was going two to three miles per hour when deceased stepped over between the tracks to board it. To so board an engine was usual in these yards. Witness Smock further says:

"Q. Now, so the jury will understand, your engine ran along here, north from the main line until you got to the first cross-over, did it not? A. Yes, sir.

"Q. Who was it threw the switch? A. Mr. Whitworth.

"Q. Mr. Whitworth himself threw that? A. Yes, sir.

"Q. Then after that was thrown, what did your engine do? A. Mr. England got off, and we backed up onto this cross-over.

"Q. You say you backed the engine? A. Yes, sir.

"Q. But you went over from the main line on that cross-over until you approached the second stand, did you not? A. Yes, sir.

"Q. Was that switch thrown? A. Yes, sir; Mr. Whitworth threw that.

"Q. Mr. Whitworth threw that, too? A. Yes, sir.

"Q. What did Mr. Shaw do at the time Mr. Whitworth was throwing that switch? A. He went around to throw this switch (indicating).

"Q. That is the third switch stand, is that right? A. Yes, sir.

"Q. And after Mr. Whitworth threw the second switch, what did he do? A. He came back then where the engine was and got on.

"Q. Your engine was standing between the two tracks? A. Yes, sir.

"Q. Between the main line and the track called long 9 and short 9, is that right? A. Yes, sir.

"Q. Then he got on the footboard, did he? A. Yes, sir.

"Q. Then what did the engine do? A. Backed up.

"Q. Backed up onto long 9? A. Yes, sir.

"Q. And had Mr. Shaw thrown the switch? A. He had thrown the switch, the third switch. Shaw had thrown the switch and was standing there to get on the engine.

"Q. Standing there to get on—you saw that, did you? A. Yes, sir.

"Q. And when the engine was nearing this stand, was he standing there near the third stand? A. We went down about six feet of him, and he stepped over between the track.

"Q. That is, between the rails? A. Yes, sir.

"Q. That is about the place where the accident happened? A. Yes, sir."

The steps of which we spoke were about 8 inches above the rails, or about 12 inches above the ground.

Smock further testified:

"Q. And those steps were on the engine there for what purpose? A. For switchmen to get on and off.

"Q. And to ride on? A. Yes, sir.

"Q. Where was Mr. Whitworth's office? Which direction from the way you were going? A. Well, his regular office was at the south end of the north yard. It is a little north from where we were there.

"Q. That is, he would be going up towards his office while he was riding on the step? A. Yes, sir; that is what he is figuring on.

"Q. And did he have anything to do with the switching movement? A. No, sir.

"Q. Directing them or taking part in them? A. No, sir.

"Q. Was that sometimes done, however, by yardmasters? A. Oh, they do it once in a while.

"Q. And he was doing it on this night? A. Yes, sir.

"Q. How far away from this point was his office? What distance? A. From where the accident occurred?

"Q. Yes. A. Oh, maybe 100 yards.

"Q. Had he prior to this time gotten upon the footboard, as on this occasion and get off at his office? A. Yes, sir.

"Q. How long had Mr. Whitworth been in the service of the company as assistant yardmaster? A. Well, I think he had been assistant yardmaster about a month.

"Q. What had he been prior to that time? A. Foreman of engines.

"Q. Was he over you in your duties? A. Yes, sir.

"Q. Who was it gave the signal for the movement of the engine? A. I did."

After detailing facts tending to show that the place of accident was well lighted by the electric headlight of the engine and the lanterns of the crew, this witness, Smock, further testified:

"Q. Tell the jury how Mr. Whitworth was standing on the step there from the time he got on up to the time he stepped over in front of Mr. Shaw. Which way was he facing? A. He was facing the north, like it would be when standing on the east side on the footboard.

"Q. Do you remember how he was holding his lantern? A. On his right side.

"Q. Was that in view of Mr. Shaw? A. Yes, sir.

"Q. When he stepped over there, did he give Mr. Shaw any warning of any kind? A. No, sir.

"Q. When he did step over, how far did he step? A. Well, about a foot and a half.

"Q. And where did he step with reference to being in front of Mr. Shaw? A. Right in front of him."

The foregoing are facts which the jury could find, if they believed the witness Smock, as they evidently did. Deceased was taken to a hospital, and died early the same morning. The law, upon the facts, and other pertinent facts, are left for the next paragraph.

III. A short resume of the foregoing facts, and other facts, is not inapropos before discussing the liability or nonliability of defendant under the facts shown: (1) Whitworth was serving in a dual capacity at the time of the accident; i. e., he, as a vice principal, gave the orders for the work, and in addition was actually participating therein as a switchman. (2) His service in such dual capacity was shown to be customary in these yards. (3) It was the rule for the first man on the switchboard to move to the center, or to the drawbar, and leave the outside end of the board open for the next man to use in getting upon the board, and this Whitmore did not do. (4) The jury could well find that Whitworth was facing north, with his back to the engine tender, and saw or could have seen deceased, and his every act. (5) The evidence further tends to show that it was usual and customary for switchmen to stand between the rails when getting upon the switchboard. (6) That with deceased standing between the rails, and ready to get on the board near the drawbar, and in the very act of getting on, Whitworth, with deceased in his plain view, suddenly changed to the place where he ought to have been from the first, and in so doing struck deceased and caused him to fall under the engine. We say deceased was in plain view of Whitworth all the time, because the jury could have well found that he was facing deceased, in a well-lighted place, from the time Whitworth boarded the engine to the time that deceased was prevented from getting on the board by the sudden action of Whitworth in changing positions.

The federal statute is important in determining liability under the facts of this case. The applicable portion, deleting the unnecessary clauses, read:

"That every common carrier by railroad while engaging in commerce between any of the several states * * * shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; * * * for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier."

Note the use of the words "officers, agents, or employees." U. S. Statutes at Large, vol. 35, p. 65 (U. S. Comp. St. § 8657).

So while Whitworth at the time of the accident was both a vice principal and an employee, as measured by the services he was rendering at the time of the accident, yet this is not really material under the statute. The negligence of an officer makes the company liable, as well as the negligence of a mere employee. The statute is broad and covers the negligent acts of all from the president of the corporation down to the mere employee. The statute speaks for itself, and we need not waste words in further discussing it. Nor need we go extensively into the cases cited pro and con. Whitworth was negligent: (1) In not moving over toward and to the drawbar when he first got upon the running board; and (2) in suddenly changing his position when he saw or could have seen deceased attempting to board the engine from the space in the middle of the track, before said Whitworth changed his position. He knew deceased had thrown a switch and was awaiting the approach of the engine to board the running board. From plaintiff's evidence he was faced toward the plaintiff at a well-lighted place, and could have observed his every movement. His failure to look, or, looking, his failure to properly act, was negligence which snuffed out the life of John Shaw. Under the statute, supra, the defendant is liable for such negligence. That the facts charged in the petition and shown by plaintiff's witnesses did not constitute actionable negligence is clearly an afterthought, because it could have all been threshed out upon a demurrer to the peti-

tion, but none was filed. The failure to file a demurrer to the petition cannot be charged as neglect or misjudgment of learned counsel for the defendant, because the petition did state a cause of action, and the proof tended to sustain all the charges in the petition.

The ordinary practice was for the first man boarding the footboard to move immediately to the drawbar, so as to leave the outer end for the next man to use. This Whitworth did not do, but, on the other hand, waited until deceased undertook to take the inner space, and then suddenly moved over so as to knock deceased under the wheels. Deceased had his foot up to step upon the board, and his hand out to grab the handhold, when Whitworth suddenly stepped over and struck Shaw, throwing him under the engine. Further, the testimony tends to show that it was usual and customary to get on the footboard from the middle of the tracks. But this is not really material in this case, because the real cause of the injury was the sudden shifting of positions by Whitworth. The evidence of the plaintiff made a case for the jury on the question of liability and actionable negligence, and we cannot disturb their finding, absent procedural error of some kind.

IV. In the original assignment of errors, it was stated:

"The trial court erred in admitting in evidence that six days after the accident Mrs. Shaw gave birth to a child, and in holding that the child was a proper beneficiary for which damages could be recovered."

In the reply brief learned counsel admits that he had not seen the opinion in the recent case of Bonnarens v. Lead Belt Ry. Co. (Mo. Sup.) 273 S. W. 1043, loc. cit. 1046, the effect of which is to deny this contention of the appellant. The Bonnarens Case, supra, was well ruled by division 2 of this court, and we concur therein. This assignment must therefore be overruled. But as said the reply brief of appellant does not combat the soundness of the doctrine announced in the Bonnarens Case, and in effect abandons the contention.

V. A further contention is that the plea of assumption of risk was good, and therefore a recovery should be denied. This contention proceeds on the theory that because deceased was getting on the footboard from between the tracks, he assumed such risk. We shall not go into the cases upon the federal doctrine of assumption of risk, and that state courts must apply that doctrine in determining the question in these federal employers' liability cases. The federal rule has never gone further than to apply the strict old common-law rule of assumption of risks. That is to say, the servant assumes the usual risks incident to the work in which he is engaged, and further that he assumes the risk of conditions of which he has knowledge, or acquires knowledge in the course of his employment. We can give the federal case law upon the subject the most extreme exposition to which some cases go, and yet it will not affect this case. The death of Shaw was occasioned by the negligent act of Whitworth, and not by the fact that he was within the two rails of the track. Nor need we discuss the fact that the proven custom of that yard was for brakemen to get upon this step while standing between the two rails upon which the engine was approaching. Shaw did not assume the negligent act of Whitworth, of which he had no knowledge, or means of knowledge, until the fatal and negligent act was done, and Shaw under the wheels of the engine. The plea of assumption of risk must fail. In Reed v. Director General of Railroads, 42 S. Ct. 191, 258 U. S. 92, 66 L. Ed. 480, the United States Supreme Court has well said:

"In actions under the federal act the doctrine of assumption of risk certainly has no application when the negligence of a fellow servant which the injured party could not have foreseen or expected, is the sole, direct, and immediate cause of the injury. To hold otherwise would conflict with the declaration of Congress that every common carrier by railroad, while engaging in interstate commerce shall be liable to the personal representative of any employee killed while employed therein when death results from the negligence of any of the officers, agents or employees of such carriers."

This is but the common sense of the thing. This contention of appellant is therefore overruled.

VI. G. R. Smock, foreman of the switch crew, had made two written statements, and had testified at the coroner's inquest. The first written statement did not especially harm plaintiff's case, or especially contradict the statements he made on the stand as a witness for plaintiff. This statement Smock made out himself, signed it, and sent it in to the proper officials. Apparently not satisfied with this statement, another was made out for him to sign, and he did so. On the stand Smock admitted the signing of the two statements, but explained that he did not know all that was in the second one, because he had not prepared it. The two statements were introduced in evidence to contradict and impeach the witness

upon the stand. He admitted his testimony before the coroner also, but explained that he had a job and wanted to hold it. The effect of it all was that his statements and evidence had been shaded in favor of the defendant, because he feared he might be discharged. As to what time he was giving the facts was a pure question for the jury.

Smock, however, was a member of a union, and defendant sought to show that under the rules of the union and by consent of the defendant, in an agreement, an employee if discharged without reasonable cause could take his case to several committees and boards for final determination. The offer of evidence which was rejected by the trial court is as follows:

"Mr. Miller: I expect I had better make my offer of proof on that, in view of what was said. I offer to prove by this witness that in the discharge of an employee he is only discharged for just cause, and then a full hearing is had before a committee of the union to which he belongs and representatives of the railroad, to determine whether or not there was just cause for the discharge of the employee, and then if the employee is dissatisfied with the result of this conference and meeting of the representatives of his organization and officers of the railroad, it may by either party be taken to the railroad wage board for a final determination."

Learned counsel for defendant had previously stated the object of such proof thus:

"Q. Are you a member of the Switchmen's Union? A. No, sir; I am a member of the Brotherhood of Railway Trainmen.

"Q. Now, when a man is discharged, what method is there for a review of it?

"Mr. Madden: I object to that testimony as being entirely immaterial. What the relation of the union is with the railroad with reference to this matter is immaterial.

"The Court: I think so.

"Mr. Miller: A man here says he is afraid he will be discharged, and I want to show no man is discharged except on full hearing and for having cause, and if a man desires he can appeal it, under the law, to the railroad wage board.

"The Court: I don't think that is material.

"Mr. Miller: I only offer this in view of the statement of Mr. Smock that he was afraid he would lose his job, and I want to show by that that it wasn't within the power of the company to discharge any man, except on a hearing and for just cause.

"The Court: I don't think we will go into that. Objection sustained."

In our judgment the trial court was right. Smock had said that he did not know what he could do if he had been discharged, and had given his reason for his statements and evidence before the coroner's jury. This evidence was bringing into the case an irrelevant issue, if it could be called an issue. It could hardly be called an issue, because Smock was not advised of his remedies, should there be a discharge. At least he so testifies. There would have to be a discharge, before Smock could go to any tribunal for redress, and he was not advised as to his remedy, as he says. The evidence is so far foreign to any method of impeaching a witness that we are constrained to rule as did the trial court. 40 Cyc. 2563 and 2570; 23 U. C. Q. B. 557; Dufresne v. Weise, 1 N. W. 59, 46 Wis. loc. cit. 298; State v. Goodbier, 19 So. 755, 756, 48 La. Ann. 770; Wigmore on Evidence, vol. 2, § 1046. This offer of evidence was to disprove the witnesses' explanation of the discrepancies between his testimony on the stand, and his previous statements. It is therefore a purely collateral issue.

In Beemer v. Kerr et al., 23 U. C. Q. B. loc. cit. 559, Draper, C. J., said:

"If he offers explanations why his statements conflict, they are neither relevant to the issue tried, nor do they alter the fact that he has contradicted himself on oath, and any evidence as to the truth of his explanations, and not as to the fact in issue, to which his evidence relates, must be collateral, and ought not to be received."

So, too, in Dufresne v. Weise, 1 N. W. 62, 46 Wis. loc. cit. 298, Orton, J., said:

"We understand that rule to be, to first call the attention of the witness sought to be contradicted by his statements elsewhere, to such statements, and the time, place and occasion; then, if denied or ignored, to prove such statements by other witnesses; and finally, to allow the first witness to reaffirm or explain his evidence, *and this is the end of the inquiry.* 1 Greenl. on Ev. § 462."

The italics above have been added by us. Further in the case of State v. Goodbier, 19 So. loc. cit. 756, 48 La. Ann. 772, the Supreme Court of Louisiana said:

"The right of the party to offer proof of contradictory statements of a witness is restricted, and ceases altogether when the contradictions are admitted. Testimony to show that the explanation, given by the witness of the admitted statements, is false, it seems to us, is inadmissible, as held by the lower court."

These cases seem to announce the general and sound rule. Cases cited by appellant are

in no way in point. The offer of proof was one covering a purely collateral matter, and the trial court properly rejected it.

VII. There is some criticism of instruction No. 5 on the measure of damages, but it is without substance. This leaves only the alleged excessiveness of the verdict. There is (which we were about to overlook) a charge that instruction No. 2 was error, because it did not mention therein the defense of assumption of risk. Assumption of risk is an affirmative defense, and must be properly pleaded and shown, and is not a constituent element of plaintiff's case, and therefore need not be included in plaintiff's instruction. Such is the effect of the ruling in State ex rel. Ambrose v. Trimble, 263 S. W. 840, 304 Mo. 533. This ruling was by court in banc, and governs this division of the court.

As to the damages it must be considered that Shaw was a younger man than was Gill in the case of Gill v. Railroad Co., 259 S. W. 93, 302 Mo. loc. cit. 331. He was not only younger, but equally as strong and healthy. His wife was much younger than Mrs. Gill. In addition, there is an infant child, shown to be healthy. The Gill Case was one in the court in banc, and the writer was the only one to dissent. While the earnings of Gill were slightly in excess of the deceased Shaw, but Shaw was two years younger, and his prospects for advancement and higher wages that much greater. Mrs. Gill was 32 years of age, and plaintiff in this case was 18 and strong and healthy. In this case deceased was making from $150 to $175 per month, and turned over his earnings to his wife, and they were living in their own home.

In Kidd v. Chicago, R. I. & P. Ry. Co., 274 S. W. 1079, the deceased was 35 years of age and earning $184 per month. He left a wife and three or four children. We permitted the verdict to stand for $25,000 and approved the Gill Case, where the verdict was for $22,333.33. Thus the rule for the measure of damages in the Gill Case has the sanction of court in banc, and of this division in the Kidd Case. Under these cases, which the writer is now obligated to follow, the verdict in this case is not excessive.

In this case death was not instantaneous, and hence an additional element of damages, not involved in cases where death is instantaneous, and hence no pain and suffering upon the part of the deceased.

The judgment is affirmed.

All concur.

NOTE.—*Right of Foreign Administrator to Sue Under Federal Employers' Liability Act.*—This question arose in Missouri for the first time in the case of Wells v. Davis, 303 Mo. 388, 261 S. W. 58, where it is held that Administratrix, appointed by the proper probate court of Arkansas to administrate the estate of her deceased son, who at the time he was killed was a resident of and engaged in Interstate Commerce in that State, is authorized by the Federal Employers' Liability Act to bring and maintain an action for damages resulting from his negligent death in the courts of the State of Missouri, against the Interstate Railroad Company by which he was employed and by which he was killed. It is declared in this case that for the purposes of such an action the Federal Employers' Liability Act, which is universal in its application, is a statute of this State, as much so as it would be had it been enacted by the General Assembly of Missouri, and authorizes the legal representative of deceased to bring the suit, and gives to Federal and State Courts concurrent jurisdiction of the cause of action. The question is very extensively considered in the case mentioned.

RECENT DECISIONS BY THE NEW YORK LAWYERS ASSOCIATION COMMITTEE ON PROFESSIONAL ETHICS

QUESTION No. 247

In the opinion of the Committee, is it proper for a special guardian appointed in an accounting proceeding in the Surrogates' Court to request the attorneys for the accounting parties to agree on the amount of his compensation in advance of the making and filing of his report?

ANSWER No. 247

In the opinion of the Committee the opportunities for abuse in making an agreement to his fees a condition precedent to the delivery of his report are so obvious that the conduct should be disapproved; after the guardian has performed his services, and delivered or filed his report, it would not be improper for him to seek the approval of his proposed charge.

The rain it raineth every day
Upon the Just and Unjust Fellow,
But chiefly on the Just because
The Unjust has the Just's umbrella.

Doc. Bart (in psychology): "Can anyone mention a case of great friendship made famous through literature?"

Wallie: "Mutt and Jeff."—Augustana Observer.

"Can't you get your number?" a friend asked Henry Peck. "You've been holding that receiver to your ear for ten minutes."

"Oh, yes," responded Henry, "I got my number. I'm talking to my wife."

DIGEST

Digest of Important Opinions of the State Courts of Last Resort and of the Federal Courts.

Copy of Opinion in any case referred to in this Digest may be procured by sending 25 cents to us or to the West Pub. Co., St. Paul, Minn.

1. **Adverse Possession**—District of Columbia.—Adverse possession cannot be charged against District of Columbia, Compton v. Rudolph, U. S. C. C. A., 12 F. (2d) 152.

2. **Alteration of Instruments** — Mortgage on Homestead.—Defendants, husband and wife, executed and delivered to plaintiff their bond for $1,200, and secured the same by a mortgage executed and acknowledged by them on their homestead in Butler County. Thereafter at request of the husband, acting without authority from the wife, an additional loan of $100 was made by plaintiff to him and the bond and mortgage respectively altered from $1,200 to $1,300 held that such alterations so made were each material and fraudulent; that the bond and the debt evidenced by it were thereby canceled as to the wife; further, that such mortgage was thereby discharged as to both husband and wife.—David City Building & Loan Ass'n v. Fast, Neb., 208 N. W. 964.

3. **Automobiles**—Authority of Driver.—The evidence does not sustain a verdict finding that the driver of the defendant's car, who was authorized to effect a sale of it, was within the scope of his authority when driving a long way from the place of the contemplated sale, and through whose negligence the plaintiff, who was riding in the car, was injured.—Stauffer v. Schilpin, Minn., 208 N. W. 1004.

4.——Contributory Negligence. — Street railway employee, engrossed in duty of adjusting switch spring when struck by automobile held not contributorily negligent as matter of law in taking no steps to warn travelers of his presence.—Gaylor v. Wienshienk, Mo., 283 S. W. 464.

5.——Duty of Guest.—Guest in automobile is under no duty to keep lookout for impending dangers.—Campion v. Eakle, Col., 246 Pac. 280.

6.——Family Car.—Rule making owner of family car liable for torts of members of his family, while operating automobile held not to apply to car diven by owner's cousin on cousin's personal business and pleasure.—Johnston v. Hare, Ariz., 246 Pac. 546.

7.——Intoxication.—Arrest without warrant for violation of Motor Vehicle Act, § 14, subd. 3, as amended by Act March 21, 1923 (P. L. p. 297), and Act March 12, 1924 (P. L. p. 445) held not illegal, where accused admitted to officer that he had been driving car, and, while intoxicated, got in the car and started the engine in officer's presence, such being "operation."—State v. Ray, N. J., 133 Atl. 486.

8——Public Convenience and Necessity.—Where proposed route for motorbus transportation approximately paralleled existing traction lines, and the traction company had made no net revenue over operating expenses and taxes during the past five years, the Public Utilities Commission should consider such fact, in so far as depletion of revenues might necessitate later abandonment of traction line.—East End Traction Co. v. Public Utilities Commission, Ohio, 152 N. E. 20.

9.——Right of Way.—The driver of an automobile, upon reaching an intersection, has the right of way over vehicles approaching on his left, and may ordinarily proceed to cross, but if the situation is such as to indicate to the mind of an ordinarily prudent person in his position that to proceed would probably result in a collision, then he should exercise ordinary care to prevent accident, even to the extent of waiving his right.—Thrapp v. Meyers, Neb., 209 N. W. 238.

10.——Scope of Employment.—Evidence that defendant's driver, ordered to put up automobile truck for night, and having no deliveries to make, was driving same beyond garage when accident occurred held to show that he was not engaged in master's business at time of accident, thereby relieving master from liability for injuries resulting from accident.—Callahan v. Weybosset Pure Food Market, R. I., 133 Atl. 442.

11.——Use of Streets.—City ordinance, prohibiting operation of motor vehicles for hire on certain streets, and prohibiting them from stopping to load or unload passengers within several miles of business district, but providing that it should not be construed to impair obligation of any contract held unreasonable, discriminatory, and invalid as police regulation, where parking was permitted on both sides of streets and another motor bus company was permitted under its contract to do things prohibited by ordinance.—Schappi Bus Line v. City of Hammond, U. S. C. C. A., 11 F. (2d) 940.

12. **Bailment** — Gratuitous Storage. — Where storage checks recited that storage should be at owner's risk, and hotel was authorized to deliver trunks to any person presenting receipts without identification without liability for negligence held that, unless excused by special circumstances, voluntary delivery of trunks to person other than tenant without production of checks, or delivery thereof to wrong apartment, was gross negligence for which bailee was liable.—Dalton v. Hamilton Hotel Operating Co., N. Y., 152 N. E. 268.

13. **Bankruptcy**—Assignment.—Question in bankruptcy proceedings as to whether assignee of bankrupt's accounts or trustee was entitled to proceeds of accounts covered by assignment made when assignee had knowledge of insolvency, but also covered by earlier assignment of future accounts, is governed by law of state wherein it arose.—In re Robert Jenkins Corporation, U. S. D. C., 11 F. (2d) 979.

14.——Contempt.—Respondents, who offered to refrain from further bidding at a trustee's sale held under order of the referee, on payment of $100 by another bidder, and later, after he purchased the property, demanded $300, under threat of making a higher bid at the confirmation hearing, held guilty of contempt in resisting an order of the referee, under Bankruptcy Act, § 41a (Comp. St. § 9625).—In re Cameron Shoe Co., U. S. D. C., 12 F. (2d) 103.

15.——Discharge.—That administration of bankrupt's estate took more than a year, that bankrupt was required to be away from district most of time since adjudication, and inadvertence of counsel held not to show that bankrupt was unavoidably prevented from filing petition within time allowed by Bankruptcy Act, § 14a (Comp. St. § 9598), so as to authorize granting of additional time.—In re Balzer, U. S. D. C., 12 F. (2d) 94.

16.——Future Rents.—In Pennsylvania, landlord of bankrupt, who invokes provision of lease that on tenant's bankruptcy or default all future rents become due, may file claim for future rent as general creditor only, and does not have priority of payment out of tenant's deposit.—In re Barnett, U. S. D. C., 12 F. (2d) 70.

17.——Malicious Injury.—Judgment against automobile driver whose car, either just before or after colliding with train, struck railroad crossing flagman throwing him beneath train, where he was fatally injured held released by discharge in bankruptcy; it not being a liability "for willful and malicious injuries to the person" of another within Bankruptcy Act, § 17 (U. S. Comp. St. § 9601).—Nunn v. Drieborg, Mich., 209 N. W. 89.

18.——Preference.—Purchaser of property from bankrupt, within four months preceding bank-

ruptcy, whose payment is used by bankrupt to prefer certain creditors, is not liable, under Bankruptcy Act, § 67e (Comp. St. § 9651), unless he participated in bankrupt's fraudulent design, or did not act in good faith or pay present fair consideration.—Rittenberg v. Kaplan, U. S. D. C., 12 F. (2d) 95.

19.——Transfer of Property.—Complaint in bankruptcy trustee's suit to set aside conveyances of bankrupt's property, alleging that bankrupt voluntarily conveyed realty in contemplation of insolvency with intent to hinder, delay, and defraud payees of bankrupt's notes and their assignees held to make out cause of action for fraud as to existing and subsequent creditors, including assignees, under Civ. Code Cal. §§ 3439, 3442.—Barr v. Roderick, U. S. D. C., 11 F. (2d) 984.

20.——Wife's Separate Property.—In view of Civ. Code La. arts. 2376, 2446, permitting sale by husband to wife, and giving her a lien on all his property, to replace her total and her paraphernal funds, husband could repay separate money loaned to him by wife without creating voidable preference under Bankruptcy Law.—Lynch v. Speed, U. S. C. C. A., 11 F. (2d) 931.

21. **Banks and Banking**—Joint Deposit.—Any presumption arising under Banking Law, § 249, from deposit of money in bank in joint name of owner and another, either or survivor to draw, is not conclusive as to ownership as between parties, and death of one of parties, after commencing action against other for fradulently withdrawing money and appropriating it, does not affect his cause of action.—Scanlan v. Meehan, N. Y., 216 N. Y. S. 71.

22.——Partnership Note.—Where member of partnership operating bank in precarious financial condition, expressly authorized attorney to institute proceedings for appointment of receiver and dissolution of partnership, equity court acquired jurisdiction to determine liability of such partner on notes which were carried as assets of bank.—Comstock v. Horton, Mich., 209 N. W. 179.

23.——Safe Keeping.—Showing that bank cashier for several years before he absconded had managed bank, transacted all its business, and ran it as if he were owner, is sufficient showing of negligence by bank to enable owner of bond left with bank for safekeeping, and which had disappeared, to recover.—Miller v. Viola State Bank, Kan., 246 Pac. 517.

24. **Bills and Notes**—Amount Blank.—Note executed and delivered, but with amount left blank, to be filled out by bona fide holder, may be enforced when properly filled out within reasonable time.—United States Nat. Bank v. Miller, Ore., 246 Pac. 726.

25.——Liability of Indorser.—Holder of note may demand payment of indorser and retain securities pledged, so that refusal to surrender collateral on offer by indorser to pay note does not discharge indorser, since offer to pay is not equivalent to payment.—Guaranty Bank & Trust Co. v. Canal Land & Live Stock Co., La., 108 So. 472.

26.——Notice of Incompetence of Signer.—Testimony of rumor, talk in the community, before the signing of note, that signer was incompetent, and that payee had heard this, was inadmissible to show the incompetency and notice thereof to payee.—Haack v. Hammer, Mo., 283 S. W. 741.

27.——Payment of Check.—Check presented, stamped paid, and charged to drawer, who had funds when check presented, is not dishonored, and indorsement is discharged, since drawer stands behind indorsement.—Peterson v. First State Bank, Col., 246 Pac. 784.

28. **Carriers of Goods**—Liability for Shortage.—Buyer of order bill of lading, who knew that letters "SLC" thereon indicated that shipper had loaded and counted packages held not innocent purchaser, where car contained less than amount indicated.—People's Sav. Bank v. Pere Marquette Ry. Co., Mich., 209 N. W. 182.

29.——Measure of Damages.—Limitation of liability by carriers to amount of stipulated valuation will only be sustained in cases in which choice of rates has been given to shipper and limitation made basis of reduced rate.—A. C. Lawrence L. Co. v. Compagnie Generale Transatlantique, U. S. D. C., 12 F. (2d) 83.

30. **Carriers of Passengers**—Location of Proper Train.—Where ticket agent, in response to inquiry, correctly informed passenger that train left at 12:45 and was then on track held that passenger was not misled thereby though he in fact boarded the wrong train, which was also on track at same time, since passenger by use of care could have ascertained location of proper train.—Shepherd v. Southern Ry. Co., S. C., 133 S. E. 231.

31.——Negligence.—Testimony of plaintiff that, when electric car suddenly stopped, it seemed all juggled up, and "floor was all shook up" and threw her off her feet held not to show unusual incident, nor negligence in operation.—Walsh v. Boston Elevated Ry. Co., Mass., 152 N. E. 64.

32.——Res Ipsa Loquitur.—Where it could not be said that, in ordinary experience of mankind, accident to a child on escalator operated by elevated railway would not have happened without fault of defendant, the doctrine of res ipsa loquitur was not applicable.—Conway v. Boston Elevated Ry. Co., Mass., 152 N. E. 94.

33.——Stumbling Over Brick on Walk.—A passenger suing for injury received when she stumbled over brick lying on walk leading from train, from which she had disembarked, had burden of proving that brick was placed on walk by person for whose misconduct terminal company or railroad was responsible, or had been on walk for sufficient length of time that by exercise of due care it should have been discovered and removed.—Meridian Terminal Co. v. Stewart, Miss., 108 So. 496.

34.——Suitable Cars.—Evidence that car was inspected shortly before the accident, and at time of purchase the axle was in proper condition, and railroad was ignorant as to cause of breakage, made question for jury as to whether railroad's duty to provide and maintain suitable cars had been performed.—Fitzmaurice v. Boston, R. B. & L. R. Co., Mass., 152 N. E. 239.

35. **Chattel Mortgages**—Lien for Storage.—Under Lien Law, § 184, and in view of section 183, and Laws 1926, c. 373, amending section 184, lien of garage keeper for storage, maintenance, keeping, or repairing motor vehicle at request of legal possessor is superior to lien of chattel mortgagee.—Courtlandt G. & R. Corp. v. New York Y. Cab Co., N. Y., 215 N. Y. S. 789.

36. **Constitutional Law**—Inheritance Tax.—Laws Ariz. 1922, c. 26, in so far as it attempts to levy an inheritance tax on shares of stock owned by nonresidents in foreign corporations owning property and doing business in Arizona, is violative of the due process clause of Const. U. S. Amend. 14.—Bardon v. Hubbs, Ariz., 246 Pac. 770.

37.——State Insurance.—Chapter 159, Laws 1919 (amended by chapter 154, Laws 1925) establishing a state fire and tornado fund for the purpose of furnishing fire and tornado insurance upon the property of the state, and counties, cities and other political subdivisions, is not unconstitutional on the ground that it abrogates or impairs the right of freedom of contract.—Minot Special School Dist. No. 1 v. Olsness, N. D., 208 N. W. 968.

38. **Contempt**—Attorney Repeating Objections.—Under Rev. Codes 1921, § 9908, subds. 3, 9, attorney giving clerk typewritten copy of plea of former jeopardy, substantially in form prescribed by section 11908, subd. 4, containing untrue allegations or allegations not provable for incorporation in minutes, is not thereby guilty of contempt; such not being attempt to falsify records.—State v. District Court, Mont., 246 Pac. 250.

39. **Corporations**—Doing Business in District.—Railroad, which had no tracks within District, and whose only activity was the solicitation of traffic for outside the District and employment of a general counsel held not "doing business" within the District, under Code, § 1537, and service of process on its soliciting agent was ineffective.—Cancelmo v. Seaboard Air Line Ry., U. S. C. C. A., 12 F. (2d) 166.

40.——Interstate Transactions.—Foreign corporation, not authorized to do business in state, though not entitled to recover on purely domestic contracts executed in violation of state law, can recover for goods bought of it and delivered as part of interstate commerce transactions.—Cleveland Cooperage Co. v. Detroit Milling Co., Mich., 209 N. W. 144.

41.—Ratification of Contract.—Where corporation and its executive officers, with full knowledge, accepted plaintiff's services, paid him his salary, held him out as second vice president and general manager, and elected him officer for first year

of corporate existence held that corporation had adopted agreement for plaintiff's services made in its behalf before organization and was liable thereon; action of executive officers being as binding as resolution of board of directors.—Navco Hardwood Co. v. Bass, Ala., 108 So. 452.

42. **Covenants** — Building Restrictions. — Deed, providing that property was conveyed for residence purposes only, and that no building other than one residence should occupy the land held to forbid the erection of an eight-family apartment building.—Green v. Gerner, Tex., 283 S. W. 615.

43. **Customs and Usages**—Payment.—Where custom of banks to repay deposits of Mexican money in Mexican bank bills became part of certificate of deposit, liability could not be affected by subsequent change in custom.—Merchants' Nat. Bank v. Cross, Tex., 283 S. W. 555.

44. **Estoppel**—Assignment of Mortgage.—Where senior mortgagee agreed to assign mortgage to junior mortgagee, who had made payments thereon held that purchaser of property was not justified in relying on recital in such assignment agreement as to amount to be paid for assignment as representing amount of incumbrance, and recital did not constitute estoppel against junior mortgagee.—Eppenbach v. Eppenbach, N. Y., 215 N. Y. S. 785.

45. **Evidence**—Affidavits.—Affidavit taken outside state cannot be received in court as affidavit, until it is shown that person before whom it was taken was authorized to perform such act.—Herbert v. Roxana Petroleum Corporation, U. S. D. C., 12 F. (2d) 81.

46. **Exchanges**—Membership of Co-operative Associations.—Statute prohibiting board of trade from refusing membership to co-operative associations, and providing against rules forbidding such associations to distribute profits to bona fide members on patronage basis held constitutional and not invalid as interference with interstate commerce, or for uncertainty and ambiguity when restricted to boards of trade within state designated as "contract markets" by Secretary of Agriculture under federal Grain Futures Act, and not invalid as applied generally to both boards of trade and co-operative organizations (Laws 1925, c. 6; Const. art. 2, § 17, art. 12, § 1).—Farmers' Co-Op. Commission Co. v. Wichita Board of Trade, Kan., 246 Pac. 511.

47. **Frauds, Statute of**—Memorandum.—Broker's memorandum of purchase of goods, in trade form, made out and sent to both seller and buyer, together with acknowledgment which was signed by each held to constitute valid contract of sale, notwithstanding no acceptance of terms of sale was sent by seller to buyer; acknowledgment of seller to broker being acceptance.—Hettrick Mfg. Co. v. Srere, Mich., 209 N. W. 97.

48. **Fraudulent Conveyances**—Dealer's Mortgage. —Automobile dealer's mortgage or trust receipt, under which bank asserted claim to and took possession of automobile, for purchase price of which mortgagor was indebted held void as to creditor as in violation of fraudulent mortgage and bulk sales statutes (Rev. St. 1925, arts. 4000, 4001), and because not registered as required by articles 5489, 5490.—Texas Bank & Trust Co. v. Teich, Tex., 283 S. W. 552.

49. **Injunction**—Picketing.—Where large number of strikers and sympathizers assembled daily before entrances to building, on seventh and eighth floors of which plaintiff had his factories, to extent of constituting unjust invasion of plaintiff's rights held that, in view of fact that plaintiff's employees numbered not over 300 of the 6,000 to 10,000 workers who used same entrances, plaintiff was entitled to injunction pendente lite, limiting number of pickets to 6 at main entrance and 4 at each side entrance of building.—Rentner v. Sigman, N. Y., 216 N. Y. S. 79.

50. **Insurance**—Conversion of Property.—Measure of insurer's liability under policy insuring against direct pecuniary loss by purchaser's conversion of automobile, depriving obligee of security for purchase-money notes, held not full amount of debt due from purchaser, but value of security at time of conversion.—Automobile Finance & Securities Co. v. Globe Indemnity Co., La., 108 So. 545.

51.——Described Premises.—Clause of "double fraud policy," insuring against robbery of insured engaged in fruit business or any of his employees while transporting money or property to or from described premises held not to cover robbery of insured while he was going from theater to his home and his alleged new place of business, which was not place described in policy.—Gershon v. Fidelity & Casualty Co., N. Y., 215 N. Y. S. 801.

52.——"From Date of Accident."—Total disability from an accident which does not begin until several weeks after its occurrence is not within the terms of a policy insuring against accident if the injury shall wholly and continuously disable the insured from date of accident.—Penquite v. General Accident Fire & Life Assur. Corp., Kan., 246 Pac. 498.

53.——Incomplete Answers.—Where applicant for health and accident insurance was required to answer as to certain serious ailments, policy issued to physician held not forfeited because of his failure to report stomach trouble and consequent headaches and insomnia, which ailment was not specified in application blank except that it might be included within expression, "any chronic or periodic, physical ailment," in absence of actual intent to deceive, in view of Act No. 52 of 1906, and Act No. 97 of 1908.—Brown v. Continental Casualty Co., La., 108 So. 464.

54.——Insurable Interest.—Person having taken out insurance on brother, who was willing that it should be done, and assisted therein held to have had insurable interest in life of brother, in view of testimony showing brotherly affection and reciprocal aid and help.—Rogers v. Atlantic Life Ins. Co., S. C., 133 S. E. 215.

55.——Insurer's Liability on Conversion.—Where purchase-money notes secured by chattel mortgage were payable to automobile finance company, surrender of automobile by defaulting purchaser to seller who resold it was act of conversion by purchaser, so as to render insurer liable under policy indemnifying company against direct pecuniary loss by purchaser's conversion depriving company of security.—Automobile Finance & Securities Co. v. Globe Indemnity Co., La., 108 So. 545.

56.——Loss in Transit.—Where insured's employee, sent to deliver securities with instructions to obtain certified check therefor, delivered securities on worthless check bearing unsigned certification stamp held that loss was not within indemnity bond covering loss of securities in transit through negligence of employees; "transit" being an act or process of causing to pass from one place to another.—Underwood v. Globe Indemnity Co., N. Y., 216 N. Y. S. 109.

57.——Ownership.—Where fire policy on dwelling house in possession of corporation under contract to purchase was issued in name of individual, without indorsement as to true state of title, and provided that it should be void if subject of insurance was building on ground not owned by insured in fee simple, and that no representative of insurer had power to waive any provision except by written indorsement, no recovery could be had thereon, though insurer's agent had knowledge of true state of title before loss.—Boston Ins. Co. v. Hudson, U. S. C. C. A., 11 F. (2d) 961.

58.——Rupture of Blood Vessel.—Death from rupture of blood vessel, caused by straining in vomiting held to result from "bodily injury," effected exclusively through "accidental means," within terms of accident insurance policy.—Ross v. International Travelers' Ass'n, Tex., 283 S. W. 621.

59.——Theft of Car.—Under automobile theft insurance policy requiring partial loss to be paid in full, irrespective of insurable value for total loss, and making it optional for insurer to return it with compensation for physical damage at any time before actual payment, where insurer returned car which had been stolen, damaged, and with equipment missing, allowing damages for loss on car and for equipment was proper, as against contention that true amount should have been difference between insurable value and amount owners admitted car was worth when returned. —Belleview Trading Co. v. International Indemnity Co., Minn., 208 N. W. 994.

60. **Interstate Commerce**—Local Taxation.—Intentional interruption of movement of commodity in interstate commerce for purposes beneficial to owner, who did not from beginning expect to have uninterrupted movement to destination, but arranged for holding it until further movement could be made, renders commodity subject to local taxation.—Gulf Refining Co. v. Phillips, U. S. C. C. A., 11 F. (2d) 967.

61.——Railroad Employee Unloading Supplies.—Railroad employee, injured while unloading supplies to be used in interstate commerce, but not then so employed, was not working on instrumentality used in interstate commerce, within federal Employers' Liability Act (Comp. St. §§ 8657-8665).—Farmers' Bank & Trust Co. v. Atchison, T. & S. F. Ry. Co., U. S. D. C., 11 F. (2d) 993.

62. **Landlord and Tenant**—Invitee.—Prospective tenant, going to cellar to inspect fuel storage facilities after having inspected an upstairs flat while accompanied by girl sent with her by defendant held defendant's invitee and not a mere licensee, and owner owed duty of keeping premises reasonably safe, as to her.—Serota v. Salmansohn, Mass., 152 N. E. 242.

63.——Mortgage Foreclosure.—A tenant of the mortgagor, who, after a mortgage foreclosure sale, takes a lease agreeing to give as rent a share of the crop, may, when the mortgagor fails to redeem, and he is threatened with eviction by the holder of the sheriff's certificate of sale, attorn to the latter and retain possession as his tenant without first being actually ousted.—McCray v. Superannuated Fund, Minn., 208 N. W. 1001.

64.——"Proceeding in Bankruptcy."—Order directing bankrupt's landlord to deliver deposit to bankruptcy trustee, and making landlord's claim for unpaid rents a general claim, involves questions arising in "proceeding in bankruptcy," reviewable by petition to revise, under Bankruptcy Act, § 24b (Comp. St. § 9608), and not by appeal, under section 25a(3), being Comp. St. § 9609, as debt or claim of $500 or over, nor as "controversy" arising in bankruptcy proceedings.—In re Barnett, U. S. C. C. A., 12 F. (2d) 73.

65. **Libel and Slander**—Libelous per se.—Charges contained in publication that milkman employed by dairy was importer of germs and had transmitted germs to milk, which he handled held libelous per se, and such as did not require proof of any damages, general or special, since they are presumed as a matter of law.—Miles v. Record Pub. Co., S. C., 133 S. E. 99.

66. **Life Estates**—Sale of Timber.—Making merchandise of standing timber by life tenant is "waste," and he is liable to account therefor, whether committed actively or permissively.—Westmoreland v. Birmingham Trust & Savings Bank, Ala., 108 So. 536.

67. **Limitation of Actions**—Tort.—In this case plaintiffs' petition discloses that the transaction complained of and the injury sustained resulting in damages was the result of the negligent and unskillful manner in which the operator attempted to perform the services of "shooting" the well incumbent upon him by reason of the contract, and the damages sought to be recovered are necessarily based upon the negligent acts of the defendant, and not upon a breach of the contract. Hence, we hold that the third subdivision of section 185, C. S. 1921, providing that certain character of actions shall be brought within two years controls in this case, rather than the second subdivision of said section, which provides that "an action upon a contract, express or implied, not in writing," can only be brought within three years from the time when the cause of action arose.—Jackson v. Central Torpedo Co., Okla., 246 Pac. 426.

68. **Logs and Logging**—Lien for Hauling.—One merely furnishing teams for hauling logs, the log owner doing the loading, driving, and unloading, is not an "employee or laborer" by Hemingway's Code, §§ 2415-2417, as amended by Laws 1922, c. 282, given a lien on the logs for his wages.—Weeks v. Seale, Miss., 108 So. 505.

69. **Master and Servant**—Dangerous Material.—Railroad, if negligent in not warning car repairer that nails furnished him were more dangerous than ordinary nails, would be liable for any damage thereby caused which was natural and reasonable result of such negligence, regardless of whether like injury had previously resulted from use of such nails.—San Antonio & A. P. Ry. Co. v. Biggs, Tex., 283 S. W. 627.

70.——Due Care.—Employee was not precluded from recovery, under Rev. Gen. St. Fla. 1920, §§ 4971-4973, for injuries from being struck by log being placed on pile by machinery on skidder, because he had stopped work long enough to warm himself by fire at place of injury.—Geneva Mill Co. v. Andrews, U. S. C. C. A., 11 F. (2d) 924.

71.——Unsafe Place.—In action under federal Employers' Liability Act (U. S. Comp. St. §§ 8657-8665) for injuries received while employe was engaged in repairing wharf, employer held entitled to directed verdict, where it was shown that injuries resulted directly from defective repair construction in which employe was engaged.—Gulf, M. & N. R. Co. v. Brown, Miss., 108 So. 503.

72. **Mines and Minerals**—Wrongful Taking of Coal.—Where coal is taken from under the land of another, wilfully, wrongfully, and intentionally, and without right, the measure of damages to the owner of such coal is the market value of the same at the mouth of the mine, without any deduction for the cost of labor and other expenses incurred in severing and transporting such coal to the mouth of the mine.—Brady v. Stafford, Ohio, 152 N. E. 188.

73. **Municipal Corporations**—Liability for Explosives.—Where a town or city, in working its streets, uses dynamite caps, an explosive, and leaves such explosive in an exposed position near the public school grounds and in close proximity to the sidewalk which is used by the school children in going to and from school, and a small boy, ten years of age, observes the box containing the dynamite caps while walking along the sidewalk and takes one of the caps and applies a lighted match causing the same to explode, inflicting a serious injury to the child, the town or city is liable for damages.—Town of Depew, Creek County v. Kilgore, Okla., 246 Pac. 606.

74.——Public Dances.—Municipality cannot prohibit orderly public dances merely because admission fee is charged; Act No. 136 of 1898, § 15, par. 26, not applying to such.—Town of Jonesville v. Boyd, La., 108 So. 481.

75.——Zoning Ordinance.—Ordinance applying throughout city, which regulates height of building, yards, rear yards, and said yards, is a valid exercise of the police power if reasonable, but if designed merely to aid in segregating different classes of buildings in different zones, it is unreasonable.—Oxford Const. Co. v. City of Orange, N. J., 133 Atl. 477.

76. **Negligence**—Defective Escalator.—Evidence of worn and defective condition of escalator handrail held to make question of defendant's negligence one for jury in action for injuries sustained when plaintiff's hand caught in such railing.—Cook v. Boston Elevated Ry. Co., Mass., 152 N. E. 58.

77.——Liability of Owner for Negligence of Independent Contractor.—Owner of cargo of lumber, piled on public dock by stevedoring contractor, cannot be chargeable with negligence as matter of law merely because pile of lumber fell and injured plaintiff, even though doctrine of res ipsa loquitur applied, where it appeared that at time of accident either an employee of contractor, or persons not shown to have had any connection with owner, were working on lumber pile.—Surry Lumber Co. v. Zissett, Md., 133 Atl. 458.

78.——Unguarded Powder Cans.—There was evidence which tended to show that one of the defendants, with the knowledge and consent of the other, operated a stone quarry in Kansas City on land owned by the latter; that three open cans of powder were left in the quarry, in the open, unprotected, unguarded, and without warning sign; that boys found the powder; that one of them, 14 years old, took some of the powder away with him and afterward exploded it; and that the explosion resulted in his death held that this court cannot say that his mother cannot recover damages for his death.—Serviss v. Cloud, Kan., 246 Pac. 509.

79. **Oil and Gas**—Amount of Royalty.—Lease providing for delivery to credit of lessors, free of cost, into pipe line equal one-eighth part of all oil, gas, casing-head gas, and gasoline produced, manufactured, and saved from leased premises, payable monthly as same be sold held construed to reserve to lessor one-eighth of manufactured products, and not merely one-eighth of value of gas delivered at wells into pipes.—Chestnut & Smith Corporation v. Amis, Tex., 283 S. W. 578.

80.——Cancellation of Lease.—The lessee of a quarter section of land under an oil and gas lease for 10 years, and as much longer as mineral could be produced in paying quantities, drilled one producing oil well and one dry hole. After expiration of the definite term, the district court canceled the lease, except as to a tract sufficient to operate the producing well. Held the judgment was correct.—McCarney v. Freel, Kan., 246 Pac. 500.

81. **Principal and Agent**—Respondeat Superior.—Oil company held not liable for damages resulting from collision between milk wagon and oil truck used in distributing its products, where truck belonged to one claimed to be its agent, and driver was employed and directed solely by him.—Sams v. Arthur, S. C., 133 S. E. 205.

82. **Principal and Surety**—Public Improvements.—Section 6832 of the Compiled Laws for 1913, requiring public officers or members of boards to take from contractors for public improvements bonds conditioned for the payment of claims on account of labor or materials furnished "to stand as security for all such bills, claims, and demands until the same are fully paid," is construed and held to require the assumption of a liability on behalf of a contractor for public improvements in favor of laborers and materialmen similar to the security of a mechanic's lien for improvements of private property.—Thompson Yards v. Kingsley, N. D., 208 N. W. 949.

83. **Railroads**—Speed of Railway Motor Car.—That plaintiff was a deputy marshal, guarding defendant's employee during strike, may be considered in determining whether he had such control over railway motor car driven by employee as resulted in his conduct being a direct and efficient cause of peril, resulting in injury.—Ellzey v. Kansas City Southern Ry. Co., U. S. C. C. A., 12 F. (2d) 4.

84. **Sales**—Rescission.—Buyers of garage business, who signed contract after having charge of business for 10 days, and were not hindered by seller in making inquiry into business, being tendered books and invoices for examination, which they declined held not entitled to rescission because seller had estimated gasoline sales at about 100 gallons daily in winter and more in summer, but actually sold only 61 gallons daily as yearly average, where there was no fiduciary relation between parties, and business had declined after sale.—Schmauder v. Dell, Ore., 246 Pac. 349.

85.——Terms.—Hosiery buyers, by signing and returning seller's "confirmation" copy of order, terms of which differed from buyers' proposal, accepted it, and were bound by its terms, since it constituted new proposal, in view of Civ. Code, §§ 1585, 1586.—May Hosiery Mills v. G. C. Hall & Son, Cal., 246 Pac. 332.

86. **Street Railroads**—Interest in Street.—Under franchise to construct and operate elevated railroad, granted by state and city under Rapid Transit Act (Laws 1875, c. 606), held that railroad became vested with interest in street in perpetuity for elevated railroad purposes, which was an easement with character of property, transferable independent of life of corporation.—In re Forty-second St. Spur of Manhat. Ry. Co., N. Y., 216 N. Y. S. 2.

87.——Res Ipsa Loquitur.—Doctrine of res ipsa loquitur held not to apply, where on a dark rainy night a truck hit by electric car was left standing near and on ground sloping towards track at point where motorman's view was obstructed by curve.—National Wholesale Grocery Co. v. United Electric Rys. Co., R. I., 133 Atl. 242.

88. **Subrogation**—Collateral on Note.—Where indorser's right to possession of collateral attached to note depended on his being subrogated to rights of holder as pledgee, and indorser did not pay note, Supreme Court will not pass on indorser's right to possession, since subrogation does not take place until payment is made, but indorser's rights will be reserved.—Guaranty Bank & Trust Co. v. Canal Land & Live Stock Co., La., 108 So. 472.

89. **Taxation**—Sale of Oil Property.—Under Tax Law, § 359, as added by Laws 1919, c. 627, profit derived from sale of oil property under contract executed in 1919, providing for unsecured installment payments to be made during 1919 and 1920 held taxable as income during years in which payments were actually received, requiring apportionment to years 1919 and 1920; Tax Law, § 364, as added by Laws 1919, c. 627, and Rules and Regulations of State Tax Commission, arts. 36, 37, not being applicable.—People v. Gilchrist, N. Y., 216 N. Y. S. 76.

90. **Theaters and Shows**—Safe Premises.—If theater floor is uneven, so that a person of ordinary care and prudence exercising such care would be likely to fall over it, jury may consider theater negligent.—Central Amusement Co. v. Van Nostran, Ind., 152 N. E. 183.

91. **Trade Unions**—Breach of Contract.—Trade union, sued for breach of contract to pay strike benefits, payment of which was discontinued by order of its duly authorized officials held entitled to affirmative instructions, in view of constitution and by-laws considered under general issue.—Brotherhood of Railroad Trainmen v. Barnhill, Ala., 108 So. 456.

92. **Trusts and Trustees**—Interest of Remaindermen.—Where, for a valuable consideration, land was conveyed to trustees to the use of a named person during his life, with direction that trustees should keep it free from incumbrances or liens and on death of such person convey it to his children held law with reference to vesting of estate in remainder under a devise did not apply, and before death of first beneficiary his children had no interest subject to attachment or execution.—Matthews v. Curtis, Ohio, 151 N. E. 778.

93. **Vendor and Purchaser**—Lien on Crop.—A contract between a vendor and a purchaser of land to be paid for on the crop payment plan, which contained a stipulation subjecting the annual crops to a lien for the price and further stipulations maturing the balance of the purchase price and providing that the contract should terminate on a definite date, is construed, and it is held that the contract does not provide for a lien upon a crop raised subsequent to the date of termination as fixed.—Breher v. Hase, N. D., 208 N. W. 974.

94.——Minor's Interest.—Where it was understood by all parties to sale of land that stated amount of cash paid was value of minor vendor's interest, and was to be used in procuring title through confirmation of sale by probate court, and deed, separate and distinct from prior deed not binding as to minor's interest, was ordered to be made to purchaser, there was severance or separation of vendors' joint interest in land as respects minor, and no vendor's lien existed on her undivided interest therein.—Hood v. Christopher, Ala., 108 So. 519.

95.——Time of Essence.—As respects payment, provision in contract for sale of land that time should be of essence thereof held waived by both parties, where it contained no provision as to place of deed before declaring forfeiture.—Hauert v. of performance, and vendor did not make tender Kaufman, S. D., 208 N. W. 981.

96. **Workmen's Compensation**—"Arising Out of Employment."—Where foreman of gang of city workmen, whose business it was to cut grass and weeds and clean streets, sought shelter in a private garage because of rainstorm, and on approaching garage was bitten by dog, from which he died, held that injury was not compensable as an accident "arising out of employment."—Ryan v. City of Port Huron, Mich., 209 N. W. 101.

97.——Fishing on Employer's Premises.—Recovery, under Workmen's Compensation Act, for death of employee killed while fishing for own purposes, is not barred, where employee was on premises of employer; employee being required to be engaged in course of his employment only when injury occurs away from employer's plant.—Bristow v. Department of Labor and Industries, Wash., 246 Pac. 573.

98.——Injury to Policeman.—A police officer, while on duty, went to his home where he kept his weapons to get his revolver. It accidentally fell upon the floor, and was discharged, breaking his leg. Held that the compensation law applied.—McDaniel v. City of Benson, Minn., 209 N. W. 26.

99.——"In or About Factory."—Defendant conducted a wholesale dairy business, in which it used a number of auto trucks. Plaintiff was employed by defendant to keep the trucks in repair. Defendant's foreman directed plaintiff, and other employees, to push a truck into a street, down a grade, to loosen the starter which had stuck, and repair it. This was done. While plaintiff was working on the truck, on the street, about 200 feet from the factory, he was struck and injured by a passing automobile. Held the injury occurred "in, on, or about the factory" of defendant, within the meaning of R. S. 44—505.—Wise v. Central Dairy Co., Kan., 246 Pac. 501.

100.—Surgical Operation.—Where consensus of expert opinion, in proceeding for compensation for permanent disability arising from injury to knee, is that outcome of operation would be problematical, employee is under no compulsion to take risk of an operation.—General Acc., Fire & Life Assur. Corp. v. Ind. Acc. Com'n, Cal., 246 Pac. 570.